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No. 74-1145

In the Supreme Court of the United States

OCTOBER TERM, 1974

EDWARD COOK,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Moreover, considering such prejudicial prosecution conduct as a whole, with a realistic view toward its probable cumulative effect upon the fairness of petitioner's trial in the light of the aforesaid factual posture of the case, affirmance herein based on the Fifth Circuit's bald conclusion that the foregoing was not cognizable as plain error deprived petitioner of due process of law. Furthermore, such conclusion (that it did not amount to plain error) is contrary to numerous well-reasoned holdings in other Circuits 27

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Edward Cook, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Judgment Below

The opinion of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on December 20, 1974. Petition for rehearing, timely filed, was denied on February 13, 1975. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Was the evidence sufficient, as a matter of law, to sustain the convictions, where the government failed to prove that petitioner's expenditures were made from taxable income rather than prior accumulations, and petitioner conclusively established the existence of a cash hoard and assets convertible to cash in an amount more than sufficient to account for all his expenditures during the entire indictment period?

2. Where petitioner admittedly did not file income tax returns for the indictment years—typically, a misdemeanor under 26 U.S.C. 7203—may he stand convicted of the felony charge of wilfully having attempted to evade the tax under 26 U.S.C. 7201, absent sufficient evidence of any affirmative conduct on his part to defeat or evade the tax? Does not the Fifth Circuit's decision herein conflict both with the teachings of *Spies* v. *United States*, 317 U.S. 492, and with substantial judicial authority from the other Circuits, as to the necessity of evidence of affirmative conduct to support conviction for the felony offense?

3. Was petitioner deprived of his constitutional right to a fair trial by the cumulative prejudicial effect of prosecution misconduct amounting to plain error of constitutional magnitude, where the prosecutor:

(A) Attempted to discredit crucial defense witnesses—whose testimony, if believed, established that petitioner had accumulated cash and assets convertible to cash prior to the first indictment year sufficient to account for all his expenditures during the entire indictment period—by asking them, on cross-examination, questions pregnant with implied factual assertions, none of which was ever factually substantiated by the government, and some of which amounted to "testimony" by the prosecutor in conflict with said defense witnesses' unrebutted and unimpeached testimony;

(B) Improperly and prejudically referred in closing argument to petitioner's allegedly incriminatory statement which had been ordered suppressed by the trial court, and misstated evidence;

(C) Improperly argued that petitioner "lied" and that he had "hidden" matters from the jury, thus indicating the prosecutor's knowledge of matters not in evidence and placing his opinion of petitioner before the jury, and prejudicially commenting to the jury upon petitioner's failure to testify?

Moreover, considering such prejudicial prosecution conduct as a whole, with a realistic view toward its probable cumulative effect upon the fairness of petitioner's trial in the light of the aforesaid factual posture of the case, does affirmance herein based on the Fifth Circuit's conclusion that the foregoing was not cognizable as plain error (notwithstanding the error was raised in post-trial motion for new trial) deprive petitioner of due process of law; and is not such conclusion (that it did not amount to plain error) contrary to numerous well-reasoned holdings in other Circuits?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

The Internal Revenue Code of 1954 (26 U.S.C.), provides in pertinent part as follows:

> Sec. 7201. Attempt to Evade or Defeat Tax.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> Sec. 7203. Willful Failure To File Return, Supply Information, Or Pay Tax.
>
> Any person required * * * to make a return * * * who willfully fails to * * * make such return, * * * at the time or times required by law or regulations, shall, . . . be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Statement of the Case

Petitioner, Edward Cook, originally was charged in a ten-count indictment (No. 71-263-Cr T) with violations of the Internal Revenue Code for the tax years 1966 through 1970. Counts 1 through 5 charged violations of 26 U.S.C. 7201, willful attempt to evade the tax, a felony, for each of the respective prosecution years. (Counts 5

through 10, charging violations of Sec. 7203, willful failure to file tax returns, a misdemeanor, for the same years, respectively (A. 1),[1] were dismissed (A. 3).)

Petitioner was found guilty of each of the five felony counts, 1 through 5 (A. 3), and was sentenced to a term of five years on each count to run concurrently. (A. 4)

Statement of Facts

It was not disputed that petitioner did not file any income tax returns for the years in question.

Government's Evidence

The government proceeded to attempt to prove its case by way of the expenditures theory. Most of the voluminous exhibits were introduced into evidence without objection and by stipulation. Some witnesses, however, were presented by the government on the witness stand, in order to lend "color" to the case. (A. 6)[2] The evidence, by way of stipulation and witnesses before the jury, demonstrated that in each of the indictment years, petitioner spent, by way of checks and cash, the approximate sums set out in each of the counts of the indictment.

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[1] "A." refers to Appellant's Appendix filed in the Court of Appeals for the Fifth Circuit in cause No. 74-1164. "Tr." refers to the Transcript of Proceedings at trial.

[2] Despite a defense offer to stipulate thereto, the government introduced evidence of certain expenditures via witnesses in its efforts to convince the jury that petitioner was a jewel thief. Such evidence pertained to petitioner's purchase of technical locksmith books and tools, and a "spy bug detector." (A. 6, Tr. 44; A. 7, Tr. 90-104)

The government did not prove a source of income.

Harry Marden, an IRS agent, testified he prepared certain schedules based upon the testimony and stipulations introduced into evidence; and that such schedules (Exhibits 94 to 98 for the respective years, 1966 through 1970) demonstrated taxable income and taxes due for each of the indictment years. (A. 12, Tr. 235) On cross-examination, he stated that if petitioner had $150,000 at the beginning of 1966, such would not be taxable, and petitioner could spend that money without being required to file an income tax return, unless he earned over $600 during that year. (Tr. 254) The expenditures on the summaries made by the witness from 1966 to 1970 totalled roughly $137,000 to $140,000. If petitioner had a cash accumulation before the taxable years, those expenditures would be offset by the cash accumulation. (Tr. 254)

Additional evidence relied on by the government in its attempts to demonstrate "evasion" of tax by petitioner is set forth as App. C.

Evidence on Behalf of Defendant

Howard Brodsky, an insurance adjuster and consultant, testified that in 1963 he was in the surety business and that petitioner placed with him certain collateral, being a 1963 convertible Cadillac, a gold coin collection as well as some additional gold coins, and a diamond whose value was appraised by a gemologist to be in excess of $75,000. (A. 12, Tr. 167) The gold coins and the ring were evaluated at over $150,000. (A. 13, Tr. 271) Three FBI agents, including agents Guilfoile and Kelly, saw the gold coin collection and the diamond ring in a safety deposit box sometime in 1964. (A. 13-14, Tr. 272) Brodsky returned the collateral directly to petitioner "sometime in 1967." (Tr. 269)

Sometime in 1964, petitioner gave Brodsky his written power of attorney, via which Brodsky entered petitioner's safety deposit box in the Little River Bank, Little River Miami and removed approximately $28,000 to $38,000 in cash and five to eight diamonds of various sizes. (Tr. 270) He delivered the cash and the diamonds to petitioner sometime in 1966. (Tr. 271)

The prejudicial cross examination by the prosecutor.

"Q. Do you remember telling special agent Guilfoile where the gold coins came from?

A. Not that I can recall, I may have.

Q. Isn't it a fact, sir, you told them those coins were submitted to you by Martin Katz and were owned by Martin Katz?

A. I don't believe so.

Q. Isn't it a fact you also later told them you returned the gold coins not to Clarence,[3] but John Cook?

A. Not so, because it was returned to Mr. Cook.

Q. Isn't it a fact you told the FBI agents it was returned to Clarence Cook?

A. I don't think so." (A. 14-15, Tr. 275-76)

* * *

"Q. Now, do you recall the diamond?

A. Yes, sir.

Q. It was a yellow diamond, wasn't it, was it referred to as a canary yellow in the trade?

A. Yes.

Q. Approximately 24 carats? Did you tell the FBI where that came from?

A. I don't recall that I really told them anything. The purpose of the meeting was to show him the property, and I don't particularly recall having any of this conversation that you are relating here.

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[3] The transcript so reads at p. 275; but Edward Cook is obviously meant, here.

Q. Do you recall having a meeting with the FBI.
A. Oh, yes.
Q. Do you recall the conversation?
A. I don't believe we had any conversation. They had made a request to examine the property. I made it available to them. When they were through, we put it back in the box, and to the best of my recollection, that was all that transpired." (A. 15, Tr. 276-77)

"Q. Didn't you tell the FBI that the 27-carat diamond was owned by Martin Katz?
A. No, sir.
Mr. Bailor (prosecutor): No further questions, your Honor." (A. 16, Tr. 278)

Ron Hanson, who knew petitioner for about 15 years (A. 16), testified he lived in Miami, Florida and owned a chain of beef outlets and freezer meat companies in various cities in the south. While petitioner was in Chicago in December, 1965, he invited petitioner to go into the business of manufacturing wigs. He wanted petitioner to invest $35,000, but petitioner declined. However, petitioner loaned him that sum in cash. Hanson subsequently went to Canada and tried to buy the business, but could not; later he returned the cash to petitioner in February or March 1966. (A. 16, Tr. 280-81)

Richard Chapman of Miami, Florida was a self-employed wholesale diamond broker. He testified that in 1968 he was associated in the diamond business with Herman Gordon. In June, 1968, petitioner brought to him and Gordon a 22-carat, 70-point large canary diamond. "It was the largest canary diamond I had ever seen." (A. 16, Tr. 290) Petitioner wanted $100,000 for the diamond, but they agreed upon the sum of $85,000, and that money was paid to petitioner in June, 1968. (A. 16, Tr. 290-91)

The prejudicial cross examination by the prosecutor.

"Q. Are you telling me as an expert in the diamond business that all diamond merchants deal exclusively in cash?

A. I didn't say all diamond merchants deal exclusively in cash. I say primarily. We have always dealt in cash with very, very few exceptions. It is a common practice in the trade that most transactions are made in a cash basis." (A. 17, Tr. 295)

* * *

"Q. Was this strictly a cash transaction?

A. Yes, sir.

Q. And you have no record of it?

A. I would say 90%, 98% of all sales made are cash.

Q. In your business?

A. In my business, yes, sir.

Q. But you are not prepared to state whether this is the custom through the diamond trade?

A. I would say it is, yes, sir. I would say throughout the diamond business on a wholesale level between diamond brokers and that, it is primarily cash.

Mr. Bailor: No further questions, your Honor." (A. 17, Tr. 298-99)

The announcement by the prosecutor of prospective rebuttal.

"Mr. Bailor: I have some rebuttal, incidentally, your Honor.

The Court: What kind of rebuttal do you have?

Mr. Bailor: I want to examine some reports on what evidence we have with respect to this collection of coins and jewels in 1963." (A. 18, Tr. 302)

The rebuttal.

There was no rebuttal by the prosecution.

REASONS FOR GRANTING THE WRIT

1.

The evidence was insufficient, as a matter of law, to sustain the convictions, where the government failed to prove that petitioner's expenditures were made from taxable income rather than prior accumulations, and petitioner conclusively established the existence of a cash hoard and assets convertible to cash in an amount more than sufficient to account for all his expenditures during the entire indictment period. Certiorari should be allowed so that this Court may speak to the requirements of proof in an "expenditures" method income tax prosecution, involving important questions of federal law which have not been, but should be, resolved by this Court.

The government proceeded by way of the so-called "expenditures" theory of proof, which is a variant of the frequently used "net worth" theory, the latter having been "grudgingly" approved as a method of proof in certain tax cases in *Holland* v. *United States*, 348 U.S. 121 (1954). This Court approved its use "grudgingly," recognizing that the net worth method of proof could be dangerous to an innocent defendant, and stressed that its use must be carefully scrutinized by the judiciary. *Id.* at 129.

And while the Court has had occasion to resolve various questions regarding the net worth method in *Holland*, *supra*, and in *United States* v. *Massei*, 355 U.S. 595 (1958), it has not yet reviewed an income tax evasion conviction where the government proceeded—as in the case at bar—by the "expenditures" theory of proof.

Here, there was substantial, unrefuted evidence that defendant possessed cash and assets convertible to cash more than adequate to cover all the expenditures made during the indictment years. (See pp. 6-9, *supra.*) Indeed, the government's sole and only attempt to counter this strong defense evidence consisted of improper innuendo during the questioning of the defense witnesses;[4] the factual assertions contained in such questions were never demonstrated by any evidence whatsoever.[5]

The Courts of Appeal have consistently held that, when utilizing the "expenditures" method of proof, the govern-

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[4] See Point 3(A), pp. 18-24, *infra.*

[5] After verdict of guilt on July 13, 1973, the trial court held an evidentiary hearing on August 6, 1973 on petitioner's assertions that the government withheld from petitioner at trial *Brady* exculpatory evidence. Defense witness Brodsky testified he entered the Little River Bank, Miami, with Cook's power of attorney and removed $28,000 or $38,000 dollars in cash and 5 to 8 diamonds (one of which was appraised at $75,000 dollars) which money and diamonds he gave to petitioner Cook in 1966. (Tr. 270-71, trial-in-chief). To rebut, the government had one, George Bourbeau, who was in charge of the Safety Deposit Box Department at the bank, testify that Brodsky's name is not on any entry card, and further, that no power-of-attorney is recognized except on a form provided by the bank. (Tr. 65-76 of 8/6/73).

The trial court denied the petitioner's motion; and the government indicted Brodsky on June 13, 1974, charging him with perjury. But in September, 1974, Brodsky's attorneys caused the President of the bank to search for the records that Brodsky claimed existed and lo and behold!, the documents were found showing the existence of the power-of-attorney and of Brodsky's signature on the box entry card. Accordingly, the government moved to dismiss the Brodsky indictment, which motion the trial court allowed on November 26, 1974.

ment must show: (1) opening available funds at the beginning of each prosecution year,[6] (2) available funds acquired during the year; (3) expenditures for the prosecution year in excess of (1) plus (2); and (4) the government must exclude non-taxable sources of available funds by affirmative evidence. *Dupree* v. *United States*, 218 F.2d 781, 784 (5 Cir. 1955); see *Taglianetti* v. *United States*, 398 F.2d 558, 562-66 (1 Cir. 1968). The government has not presented adequate proof in the case at bar to meet these requirements.

The instant decision presents an excellent opportunity for this Court for the first time to speak to the requirements of proof in an expenditures-method tax prosecution. The questions raised herein, regarding the government's burden to establish that the expenditures were made from taxable income where the defense provides ample and uncontradicted showing of prior accumulations sufficient to account for the proven expenditures, constitute important questions of federal law which have not been, but should be, decided by this Court. (Supreme Court Rule 19(1)(b).)

Certiorari should therefore be allowed, and, upon this record, petitioner's convictions should be reversed for failure of sufficient proof as a matter of law.

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[6] While the government attempted to prove petitioner's lack of opening assets by way of his ex-wife's testimony, (Tr. 226-27), that she knew of no such assets, it was demonstrated on cross-examination that, due to their separation, she could realistically testify to nothing concerning petitioner's activities and assets during the times pertinent to this cause. (Tr. 227-31)

Moreover, the government's evidence designed to portray petitioner as a jewel thief served instead to corroborate petitioner's prior accumulations defense. (See A. 5, 8; see footnotes 2 and 5 pp. 5 and 11, *supra.*)

2.

Absent sufficient evidence of any affirmative conduct on petitioner's part to defeat or evade the tax, petitioner may not stand convicted of the felony charge of wilfully having attempted to evade the tax under 26 U.S.C. 7201, where the government's relevant evidence served merely to demonstrate that petitioner failed to file income tax returns for the indictment years, as was admitted by petitioner—which failure to file amounts only to a misdemeanor under 26 U.S.C. 7203. The Fifth Circuit's decision affirming the felony convictions herein conflicts both with the teachings of this Court in Spies v. United States, 317 U.S. 492, and with substantial judicial authority from the other Circuits, as to the necessity of evidence of affirmative conduct to support conviction for the felony offense.

The felony counts of which petitioner was convicted each alleged that he committed the offense of attempted evasion of taxes by failing to file income tax returns for the years in question and to pay taxes for those years, by "concealing and attempting to conceal . . . a true and correct taxable income" in violation of 26 U.S.C. 7201. (A. 1)

The evidence herein established only that petitioner failed to file tax returns and to pay taxes for the years in question; there was no relevant evidence tending to show that he committed any affirmative acts to conceal or attempt to conceal his true taxable income.

Although petitioner engaged in some cash transactions, bank and checking accounts were in his own name and that of his wife; his home, car and boat were all purchased and maintained in his own name; and insofar as he did deal in cash, such dealing is normal for the type of "business" petitioner had engaged in—thievery, per the government's

theory. Thus the government was in no way misled, and certainly, the trail of expenditures via check, money order, and cash—always in petitioner's own name—can in no legitimate way be interpreted as "concealment" per the indictment and the requirements as set forth by this Court regarding the proof necessary to establish the felony offense.

Two definitive decisions by this Court compel the conclusion that the trial court should have granted petitioner's motion for acquittal as to all the felony counts. *Spies* v. *United States,* 317 U.S. 492 (1943), involved the requirements for proving violation of then-existing felony and misdemeanor tax statutes, (substantially the same as the statutes involved in the instant case). The Court reversed because the trial court refused to instruct the jury that an affiirmative act was necessary to support a felony conviction (see requested instruction, *Id.* at 494). The Court stated:

> "The difference between the two offenses . . . is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. . . . The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended *some willful commission in addition to the willful omissions that make up the list of misdemeanors.* Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it *a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.*" 317 U.S. at 498-99. (Emphasis added.)

In *Sansone* v. *United States*, 380 U.S. 343 (1965), this Court again had occasion to analyze the differing elements of the felony and misdemeanor charges, this time under the present statutes and reaffirmed the holding of *Spies, supra.* 380 U.S. at 351.

No case was discovered wherein mere failure to file a tax return and to pay a tax was held sufficient to sustain a felony conviction under Sec. 7201. Yet that, in essence, is what the Fifth Circuit has held in the case at bar.

Although *United States* v. *Schipani*, 362 F.2d 825 (2 Cir. 1966) (cert. granted on wiretapping issue only, 385 U.S. 825, aff'd after retrial, 414 F.2d 1262 (2 Cir. 1969)), may appear so to hold, a careful reading of the original opinion (362 F.2d 825) reveals affirmative acts in addition to the mere failure to file, namely, "evidence of Schipani's apparent attempts to conceal income . . . through use of assumed names and other devices . . ." 362 F.2d at 831. There is no such evidence in the case at bar; on the contrary, as previously noted, petitioner consistently used his correct name in all transactions, and utilized no devices whatsoever in any attempt to conceal his assets or income.

In *United States* v. *Penosi*, 452 F.2d 217 (5 Cir. 1971), the court affirmed felony convictions because Penosi actively sought to conceal his income by consistently understating his income. (See Gov't. Br., in *Id.*, No. 31,151, p. 12.) In the case at bar, however, petitioner never understated his income, but consistently maintained that his expenditures were made from cash and assets previously on hand, and maintained bank accounts in his own name and jointly with his wife.

In those cases where convictions have been affirmed, there was sufficient evidence of affirmative conduct such as that described in *Spies, supra.* Where such evidence is absent, the courts reverse. Even the Fifth Circuit has previously

so held. See, *e.g., Clay* v. *United States*, 218 F.2d 483, 485-86 (5 Cir. 1955); *Jones* v. *United States*, 164 F.2d 398 (5 Cir. 1947); *Wardlaw* v. *United States*, 203 F.2d 884, 886 & 886 n.3 (5 Cir. 1953); *Reynolds* v. *United States*, 288 F.2d 78 (5 Cir. 1961); *United States* v. *Stone*, 431 F.2d 1286, 1288 (5 Cir. 1970).

In *United States* v. *Newman*, 468 F.2d 791 (5 Cir. 1972), the Fifth Circuit held that a Sec. 7201 violation may occur where there is a failure to file the return (ordinarily, the misdemeanor Sec. 7203 violation), detailing the specifics by which Newman's felony conviction was affirmed. *Id.* at 793.

No such conduct by petitioner was shown in the instant case. In essence, all the government showed was failure to file returns and to pay tax for the years in question.

A number of cases from other Circuits, following the teachings of *Spies* and *Sansone, supra*, have reiterated the distinction between the felony and the misdemeanor as being the requirement of affirmative conduct, as opposed to mere omissions, to support a conviction for the felony, affirming only where the evidence establishes affirmative conduct. See, *e.g., United States* v. *Masheski*, 286 F.2d 345, 346 (7 Cir. 1961); *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 (2 Cir. 1972); *Gariepy* v. *United States*, 220 F.2d 252, 257-58 (6 Cir. 1955); *Elwart* v. *United States*, 321 F.2d 928, 935-36 (9 Cir. 1956); *Kirsch* v. *United States*, 174 F.2d 595 (8 Cir. 1949); *United States* v. *Smith*, 206 F.2d 905 (3 Cir. 1953); *United States* v. *Coppola*, 425 F.2d 660 (2 Cir. 1969); *United States* v. *Kafes*, 214 F.2d 887, 890 (3 Cir. 1954); *United States* v. *Cave*, 159 F.2d 464, 466-67 (8 Cir. 1947); *Cf. United States* v. *Vitiello*, 363 F.2d 240, 243 (3 Cir. 1966).

Petitioner herein has demonstrated the abundant and uncontradicted evidence of his possession of a large cash hoard and considerable gold coins and jewelry assets, converted to cash, more than sufficient to cover all of the expenditures claimed by the government. (See Point 1, *supra.*)

The Fifth Circuit's ruling on this issue constitutes a substantial departure from foregoing case law, since there was no evidence of affirmative conduct by petitioner. Certiorari should be granted to make clear this Court's previously stated position concerning the requirement of proof of affirmative conduct to support the felony conviction, and to resolve an apparent conflict amongst the Circuits.

3.

Petitioner was deprived of his constitutional right to a fair trial by the cumulative prejudicial effect of prosecution misconduct amounting to plain error of constitutional magnitude, where the prosecutor:

A. Attempted to discredit crucial defense witnesses —whose testimony, if believed, established that petitioner had accumulated cash and assets convertible to cash prior to the first indictment year sufficient to account for all his expenditures during the entire indictment period—by asking them, on cross-examination, questions pregnant with implied factual assertions, none of which was ever factually substantiated by the government, and some of which amounted to "testimony" by the prosecutor in conflict with said defense witnesses' unrebutted and unimpeached testimony;

B. Improperly and prejudicially referred in closing argument to petitioner's allegedly incriminatory

statement which had been ordered suppressed by the trial court, and misstated evidence;

C. Improperly argued that petitioner "lied" and that he had "hidden" matters from the jury, thus indicating the prosecutor's knowledge of matters not in evidence and placing his opinion of petitioner before the jury, and prejudicially commenting to the jury upon petitioner's failure to testify.

Moreover, considering such prejudicial prosecution conduct as a whole, with a realistic view toward its probable cumulative effect upon the fairness of petitioner's trial in the light of the aforesaid factual posture of the case, affirmance herein based on the Fifth Circuit's bald conclusion that the foregoing was not cognizable as plain error deprived petitioner of due process of law. Furthermore, such conclusion (that it did not amount to plain error) is contrary to numerous well-reasoned holdings in other Circuits.

A.

It is fundamental that a lawyer on either side may not raise to the level of probative evidence, inferences interjected into the case only through his questions.

At issue was whether petitioner had any assets at the start of any Count-year or a cash hoard from which the expenditures proven in each of the Count-years could have been made.

In his opening address to the jury, defense counsel stated that he would present evidence of the existence of assets and a cash hoard sufficient to demonstrate the source of the expenditures. (Tr. 13-17) In accordance with that pronouncement, the defense presented witnesses Brodsky (Tr. 265-278), Hanson (Tr. 279-282) and Chapman (Tr. 289-299). Their testimony effectively provided a

complete and total defense to the charges. (See pp. 6-9, *supra.*) Accordingly, the jury's evaluation of their credibility was crucial to their determination and resolution of the issues involved. Each of the witnesses testified, with a large mass of corroborative detail, that petitioner indeed had assets convertible to cash and also had sizable sums of cash.

To rebut this testimony, fatal to the government's case, the prosecutor used, to considerable effect, an impermissible and condemned trick of cross-examination by which the questioner implies the contrary of an answer given by the witness—and then fails to rebut with any evidence, although there was opportunity so to do.

Brodsky testified he was an insurance man and that as such, sometime in 1963, petitioner posted with him as collateral, a gold coin collection and a diamond, which diamond was appraised "in excess of $75,000" (Tr. 267) and the total was appraised in excess of $150,000. (Tr. 271) The collateral was returned directly to petitioner "sometime in 1967." (Tr. 269)

Additionally, in 1964, using a written power of attorney given to him by petitioner, he went to the Little River Bank in Little River, Miami and removed the contents of petitioner's safety deposit box, which contained from $28,000 to $30,000 in cash and 5 to 8 diamonds. (Tr. 270) He delivered the cash and the diamonds to Cook "sometime in 1966". (Tr. 271).[7] At the time he held the collateral for petitioner, three FBI agents knew of the existence of that collateral, since they were at the bank in 1964 and the contents of the safety deposit box were shown to them. (Tr. 272)

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[7] See footnote 5, p. 11, *supra.*

Thus, Brodsky gave strong evidence, supplying considerable corroborative detail which could have been rebutted before the jury, if untrue, as to the existence of both assets and a cash hoard from which petitioner could have made *all* of the expenditures involved in the case.

The cross-examination then proceeded. It was obvious that the prosecutor knew that FBI agents had examined the collateral in the safety box—just as Brodsky testified—for the prosecutor, asked, "Incidentally, was the other FBI agent a gentleman by the name of Shultz, perhaps was the other FBI agent you referred to?" (Tr. 273)

Did the prosecutor call any of the three agents to rebut Mr. Brodsky's testimony? Of course not.

Initially, when the defense rested and when the court assumed the prosecutor would rebut, he did not disappoint, for he told the court:

> "I have some rebuttal, incidentally, your Honor.
> The Court: What kind of rebuttal do you have?
> Mr. Bailor: *I want to examine some reports on what evidence we have with respect to this collection of coins and jewels in 1963.*" (Tr. 302) (Emphasis added.)

But there was no rebuttal.

Presumably, the prosecutor did what he said he would do —examine his evidence and reports with respect to the coins and jewels. He found nothing with which to rebut Brodsky's testimony. Either, then, he chose not to submit such evidence as he had to the crucible of cross-examination in front of the jury, or he was without *bona fides* in his crucial examination of Brodsky.

In either event, the error contaminated any fairness of trial.

The prosecutor adopted a vicious and unwarranted tactic which should be denounced, as it has been denounced by other courts. The full ploy of the prosecutor's desire to achieve conviction at all costs is demonstrated by the suggestions of evidence implicit in the questions asked of Brodsky. The following occurred:

> "Q. (By the prosecutor): And the FBI agents inventoried the safety deposit box, did they not?
>
> A. I don't know that they inventoried it. We made it all available to them. We laid it out on the table in the bank, and they proceeded to inspect it, to do whatever they came to do.
>
> Q. You had conversation with the FBI Agents at the time, did you not?
>
> A. Possibly.
>
> Q. Do you remember the conversation?
>
> A. Not verbatim, no.
>
> Q. Do you remember telling Special Agent Guilfoile where the gold coins came from?
>
> A. Not that I can recall, I may have.
>
> Q. *Isn't it a fact,* sir, you told them those coins were submitted to you by Martin Katz and were owned by Martin Katz?
>
> A. I don't believe so.
>
> Q. *Isn't it a fact* you also later told them you returned the gold coins not to Clarence,[8] but John Cook?
>
> A. Not so, because it was returned to Mr. Cook.
>
> Q. *Isn't it a fact* you told the FBI Agent it was returned to Clarence Cook?
>
> A. I don't think so." (Tr. 275-76) (Emphasis added.)

With respect to a canary yellow diamond, approximately 24 or 27 carats, the prosecutor asked, "Did you tell the FBI where that came from?" Brodsky said he didn't recall that he really told them anything. (Tr. 276) But

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[8] The transcript states as quoted. But either the court reporter misheard, or the prosecutor misstated; for clearly, "Edward" is meant here.

the prosecutor implied to the jury that Brodsky, in fact, *did* tell the FBI something, contrary to his direct testimony. The coup of the entire cross examination was the conclusory question:

> "Q. *Didn't you tell the FBI that the 27 carat diamond was owned by Martin Katz?*
> A. No, Sir.
> Mr. Bailor: No further questions, your Honor." (Tr. 278) (Emphasis added.)

Thus, by the end of Bailor's cross examination, the prosecutor implanted in the minds of the jury that Brodsky was a liar, that the gold coin collection was owned by Martin Katz, that Brodsky so told the FBI agents, and that the diamond (later sold by petitioner for $85,000, according to defense witness Richard Chapman; see Tr. 291) was also owned by Martin Katz *and that Brodsky so told the agents.*

Pretty powerful evidence rebutting Brodsky's direct testimony, and destroying the entire basis of the defense.

And in equally invidious fashion, the prosector employed the same technique to nullify Chapman's testimony that petitioner sold the canary diamond for $85,000 in 1966. (See pp. 8-9; *supra; cf.* p. 26, *infra.*)

Having asked those questions and having received those negative answers, the prosecutor was duty bound in law—and in fairness—to rebut before the jury. If he could not, he had no right asking the questions in the manner that he did. His failure to rebut with any witness requires a new trial.

The questions were pointedly specific so as to imply specific and accurate knowledge of evidence implicative in the prosecutor's questions. The accusatory questions could not fail to impress upon the jury that the prosecutor had knowledge of such facts, otherwise the prosecutor would not have asked such questions. *See Berger* v. *United Staes*, 295 U.S. 78, 88 (1935).

The prejudice lies in the implication from the mouth of the spokesman for the government, regardless of the witness' answers. In *Jones* v. *United States,* 338 F.2d 553 (D.C. Cir. 1964), the court reversed and remanded because the prosecutor's questions (on direct and redirect examination of its own witness) contained improper inferences which were never proven, even though the jury was instructed that the counsel's statements were not evidence and *although the witness' answers to the improper questions—as here—denied the factual assertions contained in the questions.* Even more strikingly, in *Richardson* v. *United States,* 150 F.2d 58, 64 (6 Cir. 1945), the court reversed and remanded even though the improper questions, which contained unjustifiable accusations, were withdrawn and never answered.[9]

Other cases reversing for such improper prosecution conduct include: *United States* v. *Perlstein,* 120 F.2d 276 (3 Cir. 1941); *Lee Won Sing* v. *United States,* 215 F.2d 681 (D.C. Cir. 1954); and *cf. United States* v. *Bohle,* 445 F.2d 54 (7 Cir. 1971). See also *King* v. *United States,* 372 F.2d 383, 394 (D.C. Cir. 1967).

In *Stewart* v. *United States,* 366 U.S. 1 (1961), a defendant was on trial for the third time after two reversals. At the third trial he decided to testify on his own behalf, whereas in the first two trials he did not do so. The prosecutor asked him on cross-examination "This is the first time you have gone on the stand, isn't it Willie?" On appeal, the prosecutor argued that no inference could have been drawn from that question, but the Court rejected that by stating:

> "Indeed, the recognition that such an inference will in all likelihood be drawn from leading questions of this

[9] Thus, the court recognized that it is in the implication of the question itself that the prejudice lies.

kind lies at the root of the long established rule that such questions may not properly be put unless the inference, if drawn, would be factually true." *Id.* at 7.

The real vice of the prosecutor's dubious cross-examination lies in the effect upon the jury of such statements of fact *aliunde* the record when made by a representative of the government. The jury was very well aware of the extent of the federal investigative apparatus.[10] In such circumstances, the prosecutor's cross was an invitation to the jury to accept without proof the truth of the facts implicit in his questions without regard to the repeated denials of Brodsky and Chapman. If the prosecutor's statements were true and the witnesses' denials consequently false, evidence should have been submitted to the jury to sustain that position. Yet, when the time came for the prosecutor to present rebuttal, he rested without calling one single witness.

B.

Special IRS agent Childress testified on direct examination that during the course of his investigation he interviewed petitioner. "He told me that he never filed income tax returns, that he knew the requirements of filing, and that he never made $600 a year in his life." (Tr. 155)

During the course of the case, it developed that Childress had interviewed petitioner at his home. Certain matter stated to Childress by petitioner was ruled inadmissible by the court because the agent did not follow the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). (A. 10, Tr. 208) (See App. C, p. App. 12)

Yet, repeatedly in his closing argument, the prosecutor made the suppressed statement the main basis of his argu-

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[10] "The question is not whether the prosecutor meant 'to insinuate' that his statement was based on personal knowledge. *The question is what the jury probably thought.*" *United States* v. *Handman*, 447 F.2d 853, 856 (5 Cir. 1971). (Emphasis added.)

ment to the jury that petitioner was mindful in his intent to evade the tax. And the prosecutor violated the judge's order—and petitioner's constitutional rights—both in the opening and the closing of his final argument to the jury.

Thus, it is clear that the only statement of petitioner which the jury was to receive was his statement that he did not file a tax return because he didn't have to. The statement that he did not make $600 in any year was "out of the window," according to the court's ruling. (Tr. 208)

With knowledge and with understanding of the court's ruling that the statement that he never made $600 a year was suppressed ("out of the window"), the prosecutor nonetheless repeatedly argued that Cook's statement to the IRS was that he "never made $600 a year in my life. All my property is in my wife's name." (Tr. 327)

And again Bailor argued that when the IRS comes around, Cook said, "No, I didn't file tax returns. I didn't make $600 a year in my life." (Tr. 329) Again, addressing the jury, the prosecutor argued, "He expects you to believe, ladies and gentlemen, he never had $600 worth of income in his life." (Tr. 331)

Thus, the prosecutor argued from evidence specifically excluded by the court as mandated by *Miranda*.[11]

When the prosecutor argued to the jury, "Only after the IRS got involved in the picture" did petitioner decide he better indicate that he was retired (Tr. 326), he knew he was falsifying to the jury because it was his presentation that no IRS investigation on the petitioner occurred before June, 1970.[12] (A. 8-9) Thus, in implying to the

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[11] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[12] Childress testified his first interview with defendant was June 18, 1970 (A. 8-9).

jury that defendant lied to the agents, the prosecutor only demonstrated that it was he who was misstating the evidence, if not himself downright lying to the jury.

But the worst of the prosecutor's misrepresentations was yet to come. He falsely stated to the jury that the gold coin collection and the diamond were not in Eddie Cook's name, "but was in the name of a man in Chicago named John Clarence Cook." (Tr. 354) However, defense witness Brodsky had testified the coin collection and the diamond, both valued at $150,000, belonged to petitioner, Eddie Cook, and were returned to him. This testimony was unrebutted, except by the prosecutor's impermissible false insinuations to the contrary. (See Point 3A, *supra*).

And without any record evidence or proof, the prosecutor decided to become his own unsworn expert witness as to the practice in the wholesale diamond industry. He argued to the jury, "Ladies and gentlemen, why do we deal in cash? Do the legitimate diamond businesses deal in cash? Of course not. Why do we deal in cash, no records. Very convenient to support our testimony." (Tr. 355)

Yet, the prosecutor had had an opportunity to call in any wholesale diamond merchant he desired to rebut defense witness Chapman's testimony that for the most part their transactions were in cash, but he failed so to do.

C.

Compounding other prosecutorial misconduct, the prosecutor put the imprimatur of his office in impressing the jury that defendant "was lying." (Tr. 336)

The prosecutor also alluded to the petitioner's not taking the witness stand, which is his Fifth Amendment right. For the prosecution argued:

> "Today, I want to tell you, this case is not difficult to decide. There is an extremely large amount of evi-

> dence coming in here which shows that the defendant No. 1 spent the money, made many admissions as to taxable income. Only to the IRS and to you does he need hide because he has a technical income, because he has a cash hoard. There is evidence on the record that such a cash hoard did not exist. He was lying and purposely and wilfully evading the income tax." (Tr. 336)

By stating to the jury that defendant "hid" from them, the prosecutor suggested defendant chose not to take the stand. How else could he "hide" anything from the jury? There was no contact with the jury until petitioner faced the charges at trial. As in *Desmond* v. *United States*, 345 F.2d 225 (1 Cir. 1965), the comment here "can have no effect other than to invite the jury's attention to the fact that the . . . [defendant] had not taken the stand." *Id.* at 227. See also *United States* v. *Poole*, 379 F.2d 645, 649 (7 Cir. 1967); *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529, 530 (1 Cir. 1969); *Doty* v. *United States*, 416 F. 2d 887, 890 (10 Cir. 1968); *Barnes* v. *United States*, 8 F.2d 832, 834 (8 Cir. 1925).

In making the positive affirmation that petitioner "was lying," the prosecutor unfairly and illegally put the prestige of the great office of the United States Attorney behind such positive assertion. This invasion of the province of the jury "was blatantly improper. It invaded the province of the jury. It went beyond credibility." *Hall* v. *United States*, 419 F.2d 582, 587 (5 Cir. 1969). See also cases cited at p. 23, *supra*.

Plain Error

Considering the demonstration of the multiplicity of the prosecutor's prejudicial conduct during the course of trial (his improper cross examination) and in his viciously unfair closing argument, it is the government's heavy burden to demonstrate that the errors are harmless "beyond all

reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. *Chapman* made explicit that "an error in admitting plainly relevant evidence *which possibly influenced the jury adversely* to a litigant cannot . . . be concluded of as harmless. . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was *harmless beyond a reasonable doubt.*" *Id.* at 23-24 (Emphasis added.)

The cumulative effect of the prosecutorial misconduct herein, as demonstrated above, cannot, we submit, be held "harmless beyond a reasonable doubt."

The Court of Appeals never reached that determination, however, for it concluded that petitioner's failure to have raised below the matters claimed as error herein prevented their consideration by that court unless they could be deemed "plain error." (App. A, p. 6)[13] While the court characterized the "lying" argument as "altogether improper," (App. A, pp. 8-10), for reasons inexplicable, that court decided that there was no plain error in the totality of the prosecution misconduct as asserted herein such as to be cognizable on appeal. (App. A, p. 10)

Such conclusion is not only contrary to previous Fifth Circuit cases, but further, constitutes a substantial departure from numerous well-reasoned holdings from other Circuits. *Ginsberg* v. *United States,* 257 F.2d 950, 955 (5 Cir. 1958); *United States* v. *Simmons,* 414 F.2d 800 (9 Cir. 1969); *Gov't of Virgin Islands* v. *Oliver,* 360 F.2d 297, 299-300 (3 Cir. 1966); *United States* v. *Young,* 463 F.2d 934, 940 (D.C. Cir. 1971); *Dugan Drug Stores Inc.* v. *United States,* 326 F.2d 835, 837 (5 Cir. 1964).

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[13] The Court's determination that these matters were not raised below is factually erroneous; they were indeed raised in petitioner's post-trial motion for new trial.

• • •

Because the case against petitioner was far from overwhelming (indeed, we argue insufficiency of evidence as a matter of law; see Points 1 and 2, *supra*), the prosecutor resorted to the prejudicial tactics described herein. But this Court ought not to suffer this conviction to stand in the face of the severe and repeated prosecutorial misconduct.

In the face of this misconduct, petitioner stands convicted in violation of due process of law.

To reiterate this Court's persistent position condemning such misconduct, and further, to resolve an apparent conflict amongst the Circuits as to the "plain error" aspects of this type of misconduct, certiorari should be granted, and petitioner should be relieved of the onus of his unconstitutionally obtained convictions.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD COOK,

Defendant-Appellant.

No. 74-1164.

United States Court of Appeals,
Fifth Circuit.

Dec. 20, 1974.

Appeal from the United States District Court for the Middle District of Florida.

Before COLEMAN, CLARK and RONEY, *Circuit Judges.*

CLARK, *Circuit Judge:*

Edward Cook appeals from his jury conviction on five counts of willfully evading income taxes from 1966 through 1970 in violation of 26 U.S.C. § 7201. Through the diligent efforts of new counsel in this court, he advances six grounds for reversal, the last four of which, since not properly presented below, must constitute plain error to be reviewable here.[1] First, he contends that the government's evidence was insufficient to overcome his "cash hoard" defense. Second, he argues that the evidence failed to establish willful evasion. His third, fourth and fifth grounds assign, individually and cumulatively, three instances of prosecu-

[1] Fed.R.Crim.P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *See* C. Wright, Federal Practice and Procedure § 856.

torial conduct: unsupported attempts to impeach key defense witnesses during cross examination, closing argument use of a court-excluded statement by defendant, and closing argument statements that the defendant "was lying" and failed to testify. His final plain error contention relates to a lesser-included-offense instruction. We affirm.

Following the expenditures method, the government sought to show that Cook, who was unemployed, had an income of approximately 13,000 dollars from nontaxable sources for the five years; had not filed returns for any of the years; yet, had spent approximately 150,000 dollars. *See* United States v. Penosi, 452 F.2d 217, 220 (5th Cir. 1971). Neither Cook's defense below nor the present appeal focuses on these matters. Rather his defense was that prior to January 1, 1966, he had accumulated cash and other assets of a value in excess of 150,000 dollars, which were the source of the funds spent. *See, e.g.,* United States v. Newman, 468 F.2d 791, 794 (5th Cir. 1972).

To address the sufficiency question, we must record the evidence presented at trial in some detail. The Government's proof established that Cook had not filed income tax returns for any of the years in question and that treasury agents had made an exhaustive search which failed to discover any assets held by defendant prior to January 1, 1966, other than two cars valued at 5,850 dollars. This conclusion was supported by evidence that Cook had been infrequently employed prior to 1966 and that, during the prosecution years, he had "financed" several purchases. It was stipulated that the defendant was totally unemployed and earned no income whatsoever from 1944-1948, 1951-1960 and 1964-1965, and that he received no gifts or bequests nor inheritance from his mother at her death in 1967. His former wife, Geraldine, whom he

married in February, 1961; separated from in 1962; reunited with in 1965 and divorced in May 1966, testified, *inter alia,* that defendant did not have a job in 1961 when they were married and that she did not know if or when he got his first job after that. She had to work as a secretary for a short time during the marriage. She had no knowledge that defendant had a safety deposit box, or any jewelry, or a coin collection. In addition, she testified that not only had they borrowed money from the family when they were short of cash, but they had also financed the purchase of a 1965 Oldsmobile. F.B.I. Special Agent Guilfoile testified that he had known Cook's current wife, Joan, even before 1966, but had never known her to be gainfully employed. By Cook's own statement, his employment record prior to 1951 had been sporadic and insubstantial. In fact, his only sustained employment was from 1962-1964 when he received a salary of 250 dollars per week as an employee of a jewelry company. Also tending to negate the existence of pre-1966 assets was the evidence that Cook had to obtain credit for several purchases during the prosecution years. In 1967 he purchased a 59,500 dollar house and assumed both a first and second mortgage. He also financed part of the purchase price of a 12,566 dollar Donzi Boat and a new Oldsmobile automobile.

Other evidence established abundant facts about Cook's financial activities and resources and numerous inconsistencies in his personal representations about them. In August, 1969, for example, defendant told F. M. Beirne, a local police officer, that he was still under investigation by the Internal Revenue Service because of not filing an income tax return. Beirne further quoted Cook as saying his standard explanation for this was that his wife was

wealthy and that since he had never held a job or earned 600 dollars annually, he was not required to file an income tax return.[2] This statement is in direct conflict with Cook's credit card and loan applications during the prosecution years in which he consistently represented himself to have an income of 18,000 or 20,000 dollars per year. The source *of his income was variously shown as deriving* from self-employed, semi-retired, or retired activity in stocks, bonds and investments, or the cosmetic business. Evidence of other business activity by the defendant during the prosecution years included Cook's ordering of locksmith's tools under the trade name Cook's Key and Hobby Shop and his representation in 1967 that he was in the perfume business or had something to do with a donut establishment.

Cook made substantial outlays of cash in the covered period. Included were the purchase of five cars, for which he paid out cash ranging in an amount from 2065 to 3700 dollars; a 6200 dollar initial payment on the Donzi Boat, and an 18,000 dollar cash payment for a lot. In at least two of the prosecution years, Cook's total cash payments (28,601.65 and 22,261.21 dollars) were more than double the payments for purchases he made by check.

Defendant's proof included no documentation of his pre-1966 ownership of assets. He did, however, produce three witnesses to support his claim that substantial as-

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[2] An agent of the Internal Revenue Service testified that Cook made essentially the same statement to him. Subsequent to the admission of this evidence, the Court ruled that the failure to give Cook administratively required warnings, IntsRev. Manual § 9384.2, rendered this testimony excludable. The record reveals that at this point counsel for Cook made the deliberate strategic choice to leave this testimony in the record rather than having it highlighted by a specific direction from the Judge that the jury should disregard it.

set ownership accounted for his spendings in the tax period. They were Howard Brodsky, a bondsman; Ronald Hanson, a business friend; and Richard Chapman, a self-employed dealer in jewels. Brodsky's contact with Cook was as a bail bondsman on an unrelated criminal charge. In his testimony to the jury the relationship was merely described as one requiring Cook to place collateral with Brodsky. Brodsky testified that in 1963 and 1964 Cook had safety deposit boxes containing a gold coin collection, diamonds (including a canary diamond appraised for more than 75,000 dollars), cash, and other assets which in total value exceeded 150,000 dollars. He further stated that he took possession of these items and in 1966 and 1967 redelivered their contents to Cook. Hanson testified he had known Cook in Chicago, that in December of 1965 he had borrowed 35,000 dollars in cash from Cook to establish a wig business, and that in about February or Marel of 1966, when the projected venture did not materialize, he returned these funds.

Cook also presented testimony from Richard Chapman to the effect that Chapman shared offices and a telephone with one Herman Gordon, who was a wholesale diamond merchant. Chapman testified that in the summer of 1968 he witnessed a transaction in which Gordon paid Cook 85,000 dollars in cash for a large canary diamond. Inferentially, this diamond was similar to a diamond Brodsky testified he observed to be in Cook's safety deposit box in 1963.

It is essential to affirmance to find that the jury was furnished adequate proof of the defendant's net worth at the opening of the tax period in question. United States v. Penosi, *supra;* Marcus v. United States, 422 F.2d 752, 755 (5th Cir. 1970). In this case, the inferences to be drawn

from the evidence of little or no income prior to 1966 and credit purchases after January 1, 1966 together with the special agent's testimony that Cook's net worth on January 1, 1966, the beginning of the prosecution years, was less than 6,000 dollars were opposed by the testimony of Brodsky, Hanson and Chapman. The fact that a conflict existed, however, is immaterial, because viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the record contained substantial evidence from which the jury could conclude beyond a reasonable doubt that the agent's testimony was accurate.

Similarly a reasonably minded jury could validly draw inferences from the government's circumstantial evidence of credit purchases accompanied by large and extensive dealings in cash, and inconsistent statements as to the sources of his finances that, beyond a reasonable doubt, Cook was living on taxable income received in the subject period upon which he willfully evaded taxation rather than on a cash hoard accumulated previously. United States v. Nazien, 504 F.2d 394 (5th Cir. 1974); United States v. Warner, 441 F.2d 821, 830 (5th Cir. 1971); United States v. McGlamory, 441 F.2d 130, 135 (5th Cir. 1971). These permissible inferences would be sufficient to establish affirmative evasion. Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 87 L.Ed. 418 (1943). *See also* United States v. Newman, 468 F.2d 791, 794 (5th Cir. 1972).

Cook's remaining assignments of error are raised for the first time in this court. They were not even brought before the trial court in his post trial motions. To permit review, the plain error threshold must be crossed. *See, e. g.*, United States v. Smith, 502 F.2d 512, 519 (5th Cir. 1974). Acknowledging this to be the standard, Cook

urges it was plain error for the prosecution to imply, in its cross examination of defense witnesses Howard Brodsky and Richard Chapman, that it possessed impeaching information without thereafter offering supporting evidence when the questions were answered adversely.[3] *Cf.* United States v. Constant, 501 F.2d 1284 (5th Cir. 1974). Since failure to introduce rebuttal on these points is more likely to have aided than harmed defendant, and since his counsel capitalized on the lack of such rebuttal in closing arguments, we refuse to try the issue for the first time in this court under the plain error rule.

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[3] The witness Brodsky answered these questions in the negative:

Q. Isn't it a fact, sir, you told them (F.B.I. Agents) those coins were submitted to you by Martin Katz and were owned by Martin Katz?

* * *

Q. Isn't it a fact you also later told them you returned the gold coins not to Clarence, but John Cook?

Q. Isn't it a fact you told the F.B.I. agent it was returned to Clarence Cook?

* * *

Q. Didn't you tell the F.B.I. that the 27 carat diamond was owned by Martin Katz?

The questions to and answers by the witness Chapman were:

Q. Are you telling me as an expert in the diamond business that all diamond merchants deal exclusively in cash?

A. I didn't say . . . exclusively . . . I say primarily.

* * *

Q. But you are not prepared to state whether this is the custom throughout the diamond trade?

A. I would say that it is . . . on a wholesale level between diamond brokers.

Cook's criticisms of the closing arguments urge that the prosecutor impermissibly utilized a statement which had been made by Cook to an IRS agent, but which had been ruled inadmissible by the court. Assuming this was error at all, the problem for treating it as plain error is that the very same statement had been admitted in evidence through Officer Beirne.[4] If objection had been timely made and the court's ruling had been made retroactively applicable to the IRS agent's testimony, the problem could have been clarified without prejudice. This is precisely the kind of matter that cannot qualify as plain error.

Cook further contends that the court committed plain error when it allowed the prosecutor to argue:

> "Today I want to tell you, this case is not difficult to decide. It is an extremely large amount of evidence coming in here which shows that the defendant, No. 1 spent the money, made many admissions as to taxable income. *Only to the Internal Revenue Service and to you he need hide because he has a technical income, because he had a cash hoard.* It is evidence on the record that such a cash hoard did not exist. *He was lying* and purposely and willfully evading the income tax." (Emphasis is added)

The government asserts that the "hide" allusion in this statement was intended to point out the contrast between Cook's admissions on loans and credit applications of income around 20,000 dollars a year and his later assertion that he didn't earn 600 dollars a year. They also urge that the comment was meant to question the existence of defendant's asserted cash hoard. The use of the phrase "he

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[4] See note 2, *supra*, and accompanying text.

was lying", while confessedly ill advised and inappropriate, is said to have been based on a permissible belief inferred from the evidence. *See, e.g.,* United States v. Greenberg, 268 F.2d 120, 123-124 (2nd Cir. 1959).

In the abstract, the argument is clearly objectionable.

> . . . [P]rosecutors should exercise utmost restraint and caution in fashioning arguments which may tend to support the suggestion of a comment on the failure of a defendant to testify. Additionally, expressions of personal opinion as to the credibility of witnesses for the prosecution should be avoided. "It is as much his [the prosecutor] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one".

United States v. Rhoden, 453 F.2d 598, 600 (5th Cir. 1972) *quoting* Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314, 1321 (1935).

However, to establish the "hide" comment as an allusion to the defendant's refusal to testify requires an inference which is altogether too tenuous to support plain error reversal. We note that the opening words of this sentence couple the revenue service with the trial court jury in speaking of those from whom Cook need "hide." Since the revenue service performs an extra judicial function of investigation, its mention tends to disassociate the tenor of the remarks from the hiding of courtroom testimony. It is entirely plausible to construe the thought intended to be conveyed as a challenge to the jury to use Cook's own prior representations that he had income as a basis for rejecting the defense assertion that his large spendings came from a prior accumulation and that he had no in-

come over 600 dollars for any of the years. This is what the trial was mainly about. The failure of defense counsel to object helps to confirm that the argument was sufficiently ambiguous to deny it classification as an error which plainly deprived defendant of any substantial right.

Whatever prejudicial effect might have obtained from the "lying" comment, was diminished both by an express disclaimer by the prosecution and by defense counsel's use of the prosecutor's argumentary indiscretions in an attempt to turn the "lying" remark against the prosecution.[5] At the beginning of this closing argument, the prosecutor stated:

> I want my discussion to be based on the evidence you have heard in this courtroom. As I said at the outset, what lawyers say is not evidence, no matter how important we think it is, it is not evidence and it is not properly considered by you in arriving at the verdict. It is to aid you. If your recollection of the evidence differs from what I said, follow your recollection. You are the people who are to evaluate the evidence.

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[5] Defense counsel argued that it constituted "unfair tactics" to "try to create prejudice in the minds of the jury by inflection, innuendos, insinuations" and that the prosecution was attempting to "inflame people" by "twist[ing] the truth". Then he came to the point:

> Now, I resent it. I personally resent it calling my client a liar.
>
> Now he is an American citizen and he is entitled to every kind of a courtesy; every kind of a right and privilege that you or I should be entitled to in this Court of Law. Why is he a liar? Because he tried to prove in a particular time, in 1963, he had a valuable diamond and he had a gold coin collection. And you call him a liar? Well, let us see. Now, who is lying here?
>
> I don't call anybody a liar, but I say who is making the mistake? Who is making the false innuendo?

While the comment was altogether improper and an objection would surely have brought corrective action, we must weigh the degree to which the prosecutor's argument may have affected a substantial right belonging to the defendant. We conclude that the prejudicial effect was slight, while the evidence of guilt was substantial. *See* United States v. Rodriques, 503 F.2d 1370 (5th Cir. 1974); United States v. Rhoden, 453 F.2d 598 (5th Cir. 1972). "Without putting our imprimature on every remark made by the prosecutor, we perceive no plain error which should be noticed in the absence of objection. . ." United States v. Jenkins, 442 F.2d 429, 435 (5th Cir. 1971); United States v. Scaglione, 446 F.2d 182, 188 (5th Cir. 1971).

Finally, appellant argues that misdemeanors under Section 7203 (failure to file) are not lesser included crimes under Section 7201 (willful evasion) and, thus, that the giving of a lesser-included-crime instruction was erroneous. The failure to bring the error complained of here to the attention of the trial court would bar its assignment as error under Fed.R.Crim.P. 30, unless it fell under Rule 52(b). But the instruction here involved was not error at all. The misdemeanor provisions of Section 7203 involve a willful *omission* of failing to file a return. The felony provisions of Section 7201 includes the broader offense of willful *commission* of an attempt to evade or defeat the tax. Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). *See*, United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973). *Cf.* United States v. Bowness, 504 F.2d 391 (5th Cir. 1974).

We have carefully considered appellant's auxiliary arguments and find them equally without merit.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

United States
v. 74-1164
Edward Cook

The petition for rehearing was denied on February 13, 1975.

APPENDIX C

(Additional government evidence)

FBI Agent William F. Guilfoile testified he was assigned to the Miami Office "and worked on the jewel theft squad" (A. 5, Tr. 26) and knew petitioner since about December 1962. He talked with petitioner in May, 1969, when he complimented petitioner on fixing up his home. The agent said he was surprised that petitioner was investing a lot of money "in view of his uncertain future"; to which petitioner allegedly replied, ". . . in my line of business, you know, I can't get any life insurance." Petitioner also allegedy said, "Of course, it is a calculated risk in my line of business, and it is just my way of building up some insurance." (A. 5, Tr. 29)

Guilfoile also testified that he had another conversation with petitioner in March 1970, in which petitioner allegedly "said he retired and had no need to work anymore." (A. 5, Tr. 30)

Dade County, Florida police officer Francis M. Beirne testified that he talked with petitioner on August 6, 1969, as petitioner left his house to get some milk for his baby, at which time petitioner told him that the IRS was investigating him regarding income tax. Petitioner said he was not concerned with the case or the investigation because any properties or monies that he had belonged to his wife "and he had never earned or held a job where he would have earned $600 a year." (A. 8, Tr. 110)

Emmett T. Childress, Jr., a special agent with the IRS, testified he made a criminal investigation of petitioner's tax liability, having been assigned to investigate his tax affairs in June, 1970. (A. 8, Tr. 117) He asked petitioner whether he had filed income tax returns and, "he told me that he had never filed income tax returns, that he knew the requirements of filing, and that he had never made $600 a year in his life." (A. 8, Tr. 155)

A hearing was held outside the presence of the jury wherein the court ruled that because petitioner was not given adequate *Miranda* warnings prior to questioning, the latter part of the statement is "out of the window." (A. 10, Tr. 208) (When petitioner was advised of his rights, he chose not to answer any questions until he spoke with an attorney. A. 9, Tr. 162)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1145

EDWARD COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Middle District of Florida on five counts of having willfully attempted to evade and defeat his income taxes for the years 1966 through 1970, in violation of 26 U.S.C. 7201. He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A11).

Petitioner contends (1) that the evidence was insufficient to sustain the conviction and (2) that he was deprived of a fair trial because of misconduct by the prosecution.

The government's case was predicated upon the "expenditures" method of proof.[1] See *United States* v. *Penosi*, 452 F.2d 217 (C.A. 5). The evidence established that during the prosecution years, petitioner's expenditures were in excess of $151,000, even though he had available only $13,000 from nontaxable sources (Tr. 183-185, 187-189; Exs. 87, 93).[2] During those years, petitioner had not filed income tax returns (Tr. 110-113). An exhaustive search was conducted to determine petitioner's assets, and nontaxable and taxable sources of income.[3] This

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[1]Petitioner urges (Pet. 10, 12) that certiorari should be granted because this Court "has not yet reviewed an income tax evasion conviction where the government proceeded * * * by the 'expenditures' theory of proof" and that this case "presents an excellent opportunity for this Court for the first time to speak to the requirements of proof in an expenditures-method tax prosecution." But the expenditures method of proof is simply a variant of the net worth method for establishing the receipt of unreported taxable income (see *Taglianetti* v. *United States*, 398 F.2d 558, 562 (C.A. 1), affirmed on another point, 394 U.S. 316), which this Court has approved in *Holland* v. *United States*, 348 U.S. 121. See also *United States* v. *Johnson*, 319 U.S. 503, 517, where this Court held that the fact that the defendant "had large, unreported income was reinforced by proof which warranted the jury in finding that * * * the private expenditures of * * * [the defendant] exceeded his declared available resources." In any event, petitioner does not challenge the theory of proof, but presents only the factual question of whether there was sufficient evidence to support the conviction.

[2]"Tr." and "Exs." respectively refer to the transcript of trial proceedings and the government exhibits admitted in evidence at trial.

[3]The investigating agent searched the public records in four counties; contacted financial institutions throughout the country, including over 1,000 banking institutions, securities brokers, and real estate and mortgage companies; checked both petitioner's and his wife's Social Security transcripts; checked records of the Internal Revenue Service; attempted to interview the petitioner; and, contacted third parties in an attempt to determine whether petitioner might have had financial dealings with them (Tr. 117-118, 152-154).

search revealed that petitioner had not received any inheritances or gifts (Tr. 225, 230-231), had a net worth starting point as of January 1, 1966, of $5,850 (Tr. 194-196; Ex. 92), and, except for earning $250 a week between May 19, 1962, and May 6, 1964, he earned no income or worked at different jobs, none of which lasted more than 12 days from May 21, 1944, to August 16, 1965 (Tr. 62-63, 228).[4]

The investigation also showed that while petitioner stated to bank officials that he could pledge two automobiles and a substantial amount of jewelry he maintained in his vault, he never actually borrowed any money on the strength of such assets (Tr. 86-87). In addition, while consistently representing on credit card and loan applications during the prosecution years that he had an income of $18,000 to $25,000 derived from the cosmetic business[5] or from activity in stocks, bonds, and investments (Tr. 84-85, 133, 137, 139, 142, 150), petitioner told Francis Beirne, a police officer with the Public Safety Department of Dade County, Florida, at the time he was under investigation by the Internal Revenue Service, that his standard explanation for not filing income tax returns was that his wife had all the wealth and that he had never held a job or earned $600 in any one year (Tr. 108-109, 113). Finally, the evidence established that

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[4]As the court of appeals noted (Pet. App. A2), petitioner was totally unemployed and earned no income whatsoever from 1944-1948, 1951-1960 and 1964-1965.

[5]Evidence of other business activity by petitioner during the prosecution years included his ordering of locksmith's tools under the trade name Cook's Key and Hobby Shop and his representation in 1967 that he was in the perfume business or had something to do with a doughnut establishment (Tr. 71, 103-104).

petitioner had large and extensive dealings in cash during the prosecution years (Tr. 37-38, 69-70, 76, 129-131) and that his cash expenditures were significantly larger than expenditures made by check (Tr. 188-189).

1. Contrary to petitioner's contention (Pet. 10-12), the court of appeals correctly concluded that there was sufficient evidence to sustain his conviction for income tax evasion. Petitioner's claim that there was unrefuted evidence that he possessed cash and convertible assets sufficient to account for the cash expenditures has no support in the record. From the evidence of little or no income prior to 1966, credit purchases during the prosecution years, failure to list the cash and assets as collateral on loan applications, and the absence of non-taxable sources of income, the jury was amply justified in concluding that he was living on taxable income received during the prosecution years, upon which he willfully evaded taxation, rather than on a previously accumulated cash hoard.

Petitioner's assertion (Pet. 13-17) that there was no proof of any affirmative act of evasion, as required by *Spies* v. *United States*, 317 U.S. 492, and *Sansone* v. *United States*, 380 U.S. 343, is similarly without merit. Evidence of petitioner's large and extensive cash dealings and of his inconsistent statements as to the sources of his income was sufficient to permit the jury to infer that he had engaged in conduct, the "likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, *supra*, 317 U.S. at 499.

2. Petitioner further contends (Pet. 17-29) that various actions of the government prosecutor, to which no ob-

jection was made, deprived him of a fair trial.[6] Specifically, he argues that the prosecution improperly implied in its cross-examination of defense witnesses Brodsky and Chapman that it possessed impeaching evidence, although it thereafter did not offer rebuttal when the questions were answered adversely. However, petitioner's counsel capitalized upon the lack of rebuttal in his closing argument (Tr. 342) to show that the answers to the questions supported the defense. As the court of appeals noted (Pet. App. A7), the government's failure to provide rebuttal was "more likely to have aided than harmed [the] defendant."

Petitioner also contends (Pet. 26-27) that there was plain error in the prosecution's closing argument to the jury. In arguing to the jury, the prosecutor stated (Tr. 336):

> Only to the Internal Revenue Service and to you does he need hide because he has a technical income, because he had a cash hoard. It is evidence of the record that such a cash hoard did not exist. He was lying and purposely and willfully evading the income tax.

The court of appeals correctly held (Pet. App. A9) that petitioner's attempt to characterize the "hide" comment

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[6]Petitioner asserts (Pet. 28) that the court of appeals was incorrect in treating these claims under the "plain error" rule, because the claims were, in fact, raised in the trial court—*i.e.*, in a post-trial motion for a new trial (Pet. 28, n. 13). However, both in his reply brief (p. 11) and in his petition for rehearing (pp. 2-3), petitioner conceded that these claims had not been raised in the trial court. Moreover, the policy underlying the "plain error" principle is that objections should be made prior to verdict, at a time when the matter objected to, if improper, can be corrected without need of a new trial. Accordingly, post-verdict claims cannot avoid application of the "plain error" standard of review.

as an allusion to his "refusal to testify requires an inference which is altogether too tenuous to support plain error reversal." At most, the remark is ambiguous. *Desmond* v. *United States*, 345 F.2d 225 (C.A. 1), relied upon by petitioner (Pet. 27), is distinguishable; there the prosecutor stated unambiguously, in a situation in which a nontestifying defendant was clearly the only one who could contradict the government's evidence, that the government's evidence "stands unimpeached and uncontradicted" (345 F.2d at 226).

The remark of the prosecutor that petitioner "was lying" was not an inappropriate characterization of his testimony in the face of the overwhelming evidence of his misstatement of income. Indeed, defense counsel not only did not object to the remark, but he attempted to turn it against the prosecutor in his own closing argument (see Tr. 341). Under these circumstances, and in the face of evidence of guilt that the court of appeals characterized as "substantial" (Pet. App. A11), there was no improper prejudicial effect from the prosecution's closing argument.[7]

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[7]Petitioner also contends (Pet. 24-25) that the prosecutor improperly referred to testimony of an agent of the Internal Revenue Service that petitioner had told him that he did not have to file tax returns as he never made $600 a year in his life. Petitioner asserts that this testimony was ruled inadmissible. The testimony, however, came in before any objection was offered (Tr. 155-156). After a hearing out of the presence of the jury, petitioner's counsel, rather than moving to strike the testimony, said, "I know it will be very delicate if we reopen it before a jury" (Tr. 223). Moreover, as the court of appeals noted (Pet. App. A8), "the problem for treating it as plain error is that the very same statement had been admitted in evidence through Officer Beirne" — *i.e.*, that petitioner told him that his standard explanation to the Internal Revenue Service for not filing returns was that he never had $600 income in any one year.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

The refusal of the court of appeals to reverse upon the basis of "plain error" does not, as petitioner contends (Pet. 28-29), create a conflict of decisions. Since a determination that "plain error" has occurred depends upon a thorough consideration of the peculiar facts of each particular case (*Kotteakos* v. *United States*, 328 U.S. 750, 761-765), the cases cited by petitioner (Pet. 28) are distinguishable on their facts.